Supreme Court, U.S.
FILED
FEB 9 1984
ALEXANDER L. STEVAS
CLERK

Case No. 83-490

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

RALPH DAVIS, individually, CHESTER BLAKEMORE, officially as the Director of the Department of Highway Safety and Motor Vehicles; and J. ELDREDGE BEACH, individually and as Director of the Florida Highway Patrol, Department of Highway Safety and Motor Vehicles, Appellants,

v.

GREGORY SCOTT SCHERER, Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

BRIEF FOR THE APPELLANTS

JIM SMITH
ATTORNEY GENERAL

MITCHELL D. FRANKS*
CHIEF TRIAL COUNSEL

VICKI GORDON KAUFMAN
BRUCE A. MINNICK
ASSISTANT ATTORNEYS GENERAL

Department of Legal Affairs
The Capitol, Suite 1501
Tallahassee, Florida 32301
(904) 488-9935

Counsel for Appellants

*Counsel of Record

QUESTIONS PRESENTED

1. Whether the provisions of Chapter 110, Florida Statutes (1981), and its implementing rules, which relate to post-termination hearings for state employees, are unconstitutional.

2. Whether the violation of agency regulation or state law abrogates the defense of good faith immunity when the conduct in question does not violate clearly established federal constitutional law.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND REGULATIONS	3
STATEMENT OF THE CASE	6
SUMMARY OF ARGUMENT	13
ARGUMENT	18
I. THE PROVISIONS OF CHAPTER 110, FLORIDA STATUTES (1981), WHICH RELATE TO POST-TERMINATION HEARINGS, ARE CONSTITUTIONAL.	18
A. The Issue of Chapter 110's Constitutionality Was Not a Justiciable Issue and Was Moot.	18
B. Chapter 110, Florida Statutes (1981), Is Constitutional On Its Face.	29

C. Chapter 110, Florida Statutes, was Constitutionally Applied to Appellee. 40

II. APPELLANTS ARE ENTITLED TO GOOD FAITH IMMUNITY BECAUSE THEIR CONDUCT DID NOT VIOLATE CLEARLY ESTABLISHED FEDERAL CONSTITUTIONAL LAW. 50

CONCLUSION 73

CERTIFICATE OF SERVICE 74

TABLE OF AUTHORITIES

CASE	PAGE
Alabama State Federation of Labor v. McAdory, 325 U.S. 450 (1945)	31
Alsbury v. United States Post Office, 530 F.2d 852 (9th Cir. 1976), cert. den., 429 U.S. 828 (1977)	47
Anderson v. Edwards, 505 F.Supp. 1043 (S.D. Ala. 1981)	39
Ashcroft v. Mattis, 431 U.S. 171 (1977)	24, 28
Barry v. Barchi, 443 U.S. 55 (1979)	40, 41 42
Bickel v. Burkhart, 632 F.2d 1251 (5th Cir. 1980)	39
Blackford v. Maryland Automobile Insurance Fund, 532 F.Supp. 24 (D. Md. 1981)	45, 47
Buttfield v. Stranaham, 192 U.S. 470 (1904)	15, 30
Butz v. Economou, 438 U.S. 478 (1978)	53, 60, 62, 72
Caswell v. Califano, 583 F.2d 9 (1st Cir. 1978)	36, 43

Charter Air Center v. Florida Public Service Commission, 503 F.Supp. 243 (N.D. Fla. 1980) 32

Ciechon v. City of Chicago, 634 F.2d 1055 (7th Cir. 1980) 47

Cornelius v. Minter, 395 F.Supp. 616 (D.C. Mass. 1974) 36

Crowder v. Lash, 687 F.2d 996 (7th Cir. 1982) 66

Davis v. Williams, 617 F.2d 1100 (5th Cir. 1980), cert. den., 449 U.S. 937 (1981) 38, 39

Defunis v. Odegaard, 416 U.S. 312 (1974) 21

Fujiwara v. Clark, 703 F.2d 357 (9th Cir. 1983) 66

Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), cert. den., 449 U.S. 1113 (1981) 33

Golden v. Zwickler, 394 U.S. 103 (1969) 13, 19

Graham v. Richardson, 403 U.S. 365 (1971) 31

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 16, 17, 54, 56, 57, 59, 60, 62, 63, 69

Houston and Texas Central Railroad Co. v. Texas,
177 U.S. 66 (1900) 33

In re S.L.E., Inc.,
674 F.2d 359 (5th Cir. 1982) 23

International Longshoremen's and Warehousemen's Union, Local 37 Boyd, 347 U.S. 222 (1954) 19, 20

Johnson by Johnson v. Brelje,
701 F.2d 1201 (7th Cir. 1983) 63

Jordan v. United Insurance Co. of America, 289 F.2d 778 (D.C. Col. 1961) 35

Lewis v. United States,
445 U.S. 55 (1980) 32

Missouri Pacific Railroad Co. v. Boone, 270 U.S. 466 (1926) 32

Mt. Healthy City School District Board of Education v. Doyle,
429 U.S. 224 (1977) 66

Murphy v. Hunt,
455 U.S. 478 (1982) 22

National Labor Relations Board v. Laughlin Steel Corp.,
301 U.S. 1 (1936) 32

North Carolina v. Rice,
404 U.S. 244 (1971) 14, 23

O'Conner v. Donaldson,
422 U.S. 563 (1975) 70

O'Shea v. Littleton,
414 U.S. 488 (1974) 21

People v. Armor,
523 P.2d 1173 (Cal. 1974) 37

Port Construction Co. v.
Government of Virgin Islands,
359 F.2d 663 (3d Cir.
1966) 31

Procunier v. Navarette,
434 U.S. 555 (1977) 52, 56,
57, 60,
61, 62,
70

Regional Rail Reorganization
Act Cases, 419 U.S. 102 (1974) 30

Rhode Island Affiliate, American
Civil Liberties Union, Inc. v.
Rhode Island Lottery,
553 F.Supp 752 (D.R.I. 1982) 65

Ross v. United States Post Office,
664 F.2d 191 (8th Cir. 1981) 46

Scheurer v. Rhodes,
416 U.S. 232 (1974) 50, 59,
60

Silverman v. Ballantine,
694 F.2d 1091 (7th Cir. 1983) 64

Southwestern Railway Co. v. Arkansas, 235 U.S. 350 (1914) 33

Stolberg v. Caldwell, 423 F.Supp. 1295 (D. Conn. 1976) 48

Thompson v. Bass, 616 F.2d 1259 (5th Cir. 1980), cert. den., 449 U.S. 983 (1980) 47

Thornhill v. State of Alabama, 310 U.S. 88 (1939) 38

United Public Workers of America v. Mitchell, 330 U.S. 75 (1947) 15, 19

United States Parole Commission v. Geraghty, 445 U.S. 388 (1980) 22

United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) 34

United States v. Thompson, 452 F.2d 1333 (D.C. Cir 1971), cert. den., 405 U.S. 998 (1972) 31, 33

United States v. Vuitch, 402 U.S. 62 (1971) 31

Weisbrod v. Donigan, 651 F.2d 334 (5th Cir. 1981) 27

Wilkinson v. Abrams, 627 F.2d 9 (1st Cir. 1980) 43, 44

Williams v. Bennett, 689 F.2d 1370 (11th Cir. 1982) 66

Williams v. Treen,
671 F.2d 892 (5th Cir. 1982),
cert. den., ___ U.S. ___,
103 S.Ct. 762 (1983) 58, 59, 68, 69, 72

Wood v. Strickland,
420 U.S. 308 (1975) 51, 53, 56, 57, 60, 62

OTHER CITATIONS

1 Sutherland Statutory
Construction §2.06 (1973) 38

2A Sutherland Statutory
Construction §45.11 (1973) 32, 33, 34

19 U.S.C. §1305(a) 34

28 U.S.C. §1254(2) 2

§110.061, Fla. Stat. (1977) 9, 10, 13, 42

§110.309, Fla. Stat. (1981) 3, 29, 42

Chapter 110, Fla. Stat (1981) 10, 11, 13, 14, 18, 20, 25, 29, 30, 40

§22M-2.08, F.A.C. 4

OPINIONS BELOW

The original Memorandum Opinion and Order of the United States District Court for the Northern District of Florida (1a-56a[1]) is reported at 543 F.Supp. 4 (N.D. Fla. 1981). The Order Amending Judgment (62a-78a) is not reported.

The Rule 25 affirmance of the Court of Appeals for the Eleventh Circuit (83a-84a) is not reported. The denial of Appellants' Petition for Panel Rehearing by the Court of Appeals for the Eleventh Circuit (85a-86a) is not reported.

---

[1]References to the appendix to Appellants' Jurisdictional Statement are denoted "a". References to the Joint Appendix are denoted "JA". References to the transcript of the trial in the district court are denoted "T". References to the record in the United States Supreme Court are denoted "R".

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit (83a-84a) was entered on June 30, 1983. A Petition for Panel Rehearing was denied on August 22, 1983. (85a-86a).

A Notice of Appeal to the United States Supreme Court was filed in the Court of Appeals for the Eleventh Circuit (87a-88a) on September 2, 1983.

The Jurisdictional Statement was docketed in this Court on September 21, 1983. Probable jurisdiction was noted on December 12, 1983. (JA 67). The jurisdiction of this Court rests upon 28 U.S.C. §1254(2).

STATUTES AND REGULATIONS

Section 110.309, Florida Statutes (1981):

110.309 Procedure with respect to suspensions and dismissals.-

(1) A permanent employee in the State Career Service System who is suspended or dismissed by an agency or officer shall be entitled to a de novo fact-finding hearing. Such hearing shall be conducted by the commission itself, unless otherwise provided by law.

(2) Upon a finding that just cause existed for the suspension or dismissal, the commission shall affirm the suspension or dismissal.

(3) Upon a finding that just cause did not exist for the suspension or dismissal, the commission may order the reinstatement of the employee, with or without back pay.

(4) Upon a finding that just cause for disciplinary action existed, but did not justify the severity of the action taken, the commission may, in its discretion:

(a) Reduce a dismissal to a suspension for such time as the commission may fix; or

(b) Reduce the period of a suspension.

(5) Any order of the commission issued pursuant to subsection (3) or subsection (4) shall be conclusive on the agency or officer concerned. The order may include an amount, to be determined by the commission and paid

by the agency, for reasonable attorney's fees, witness fees, and other out-of-pocket expenses incurred during the prosecution of an appeal against an agency in which the commission sustains the employee.

Section 22M-2.08, F.A.C.:

22M-2.08 Setting Appeal for Hearing.

(1) Either party may file a motion showing that discovery is complete and that an appeal is ready to be set for hearing. Upon the filing by either party of a motion to set an appeal for hearing, the appeal shall be set on the hearing docket within 30 days. The Commission shall hear all appeals as scheduled on the docket within a geographic area, as the Commission's travel schedule permits. The Commission reserves the right, within the group of hearings set for given dates, to hear cases out of docket order, to make the best use of its available hearing time.

(2) Time for appeal hearings shall be allotted to appeals according to the circumstances of each particular appeal.

(3) Unless otherwise stipulated by the parties, at least fourteen days' notice of the hearing shall be given.

(4) An appeal hearing may be held without the presence of the appealing party upon proof of notice of hearing having been properly given to the appellant. A default shall not be entered in any appeal and the agency

shall be required to present a prima facie case in support of the allegations upon which the agency action was taken.

(5) Except in instances where good cause is shown, motions for continuance must be filed not later than five calendar days after receipt of notice of the hearing, and shall be granted solely in the discretion of the Commission or its presiding officer. Motions for continuance will be granted only in cases of extreme emergency.

STATEMENT OF THE CASE

Gregory Scott Scherer, Appellee, was employed in January, 1975, as a radio-teletype operator with the Florida Highway Patrol ("FHP"), a division of the State of Florida Department of Highway Safety and Motor Vehicles ("DHSMV"). (R. 536). The Appellants, Ralph Davis, Chester Blakemore, and J. Eldredge Beach, were respectively, the Executive Director of the DHSMV until September 30, 1978, Davis' successor, and the Director of the FHP. (R. 536).

In August, 1977, Appellee became an auxiliary deputy with the Escambia County Sheriff's Office. (T. vol. I, p. 73). DHSMV Policy Number 009 required Appellee to obtain permission for such secondary employment. (R. 537). Appellee requested permission and a letter granting permission was prepared and signed by Appellee's Captain. (T, vol. II, pp. 53, 61).

The Captain subsequently determined that a conflict could arise from holding two law enforcement positions, and he instructed his secretary not to mail the letter granting approval. (T, vol. II, pp. 46-47, 53, 61). Several days later, the Captain learned that the approval letter had been mailed inadvertently. (T, vol. II, pp. 46-47, 53, 61-62).

A decision was then made to disallow Appellee's request for secondary employment. (T, vol. I, p. 215; vol. II, p. 47). Appellee was notified orally by his supervisors as to their decision, (T, vol. I, pp. 222-231), and as to why his request had been disapproved. (T, vol. I, p. 76; vol. II, p. 105). Appellee was also informed in writing of the denial of his request. (R. 537).

Despite the denial of his request for dual employment, Appellee continued to work

as an auxiliary deputy. (T, vol. II, p. 66). The problem of Appellee's dual employment was discussed with him, and he was informed of the consequences of his actions. (T, vol. II, p. 48). Appellee was then ordered to terminate his employment as an auxiliary deputy, and Appellee responded in writing that he would not do so. (R. 538). By certified letter dated October 24, 1977, Appellee was terminated from his position with the FHP. (R. 538).

Appellee appealed his termination to the Florida Career Service Commission. (R. 539). On August 10, 1978 (JA 39), prior to the scheduled hearing before the Commission, Appellee's attorney, with the full knowledge and approval of Appellee, negotiated a settlement of his case. The settlement provided for back pay, reinstatement and other benefits. (T, vol.

I, pp 94-97, 131-132). Subsequently, on January 13, 1979 (JA 40), Appellee voluntarily resigned from his position pending an investigation of allegations of radio tampering. (T, vol. I, pp. 116, 198-201).

On September 1, 1979, Appellee filed an Amended Complaint in the United States District Court for the Northern District of Florida. (JA 6-23). The Amended Complaint alleged a denial of procedural due process and a denial of the First and Ninth Amendment right of privacy arising from Appellee's termination.

The case was tried before the Honorable Judge William Stafford, and a Memorandum Opinion and Order (1a-55a) was entered, which held, in pertinent part, that section 110.061, Florida Statutes (1977), was unconstitutional because it did not provide pre-termination procedures, a prompt post-

termination hearing and back pay to a prevailing employee. The Memorandum Opinion and Order further found that Appellants Ralph Davis and J. Eldredge Beach were not entitled to the defense of good faith immunity because the law on pre-termination due process was settled at the time of their actions.

Subsequently, the district court entered an Order Amending Judgment (62a-78a) due, in part, to the repeal of section 110.061, Florida Statutes (1977). This Order vacated the portion of the previous order declaring section 110.061, Florida Statutes (1977), and its rules and regulations unconstitutional, and replaced it with a holding that the 1981 version of Chapter 110, Florida Statutes, and its implementing rules, were unconstitutional insofar as they failed to provide a prompt post-termination hearing. The Order

Amending Judgment also recognized that the law as to pre-termination due process was not clearly established at the time in question and vacated that portion of the prior order. However, the district court went on to find that Appellants had violated a regulation of their own agency, General Order 43, which required an investigation into the circumstances surrounding an alleged offense. The district court found that this violation deprived Appellants of good faith immunity.

Appellants appealed the district court's ruling, both on the constitutionality of Chapter 110, Florida Statutes (1981), and its implementing rules, and the issue of good faith immunity, to the Court of Appeals for the Eleventh Circuit. The Court of Appeals issued a Rule 25 affirmance, without explanation, based on the order of the district judge. (83a-

84a). Appellants filed a Petition for Panel Rehearing which was denied. (85a-86a). Appellants then filed a Notice of Appeal to the Supreme Court. (87a-88a).

SUMMARY OF ARGUMENT

I.A. Chapter 110, Florida Statutes (1981), and its implementing rules, insofar as they relate to post-termination hearings, are constitutional. The district court should never have reached the issue of the statute's constitutionality and entered a declaratory judgment on such a question because the court had no justiciable issue before it.

Federal constitutional law requires a live dispute before a declaratory judgment may be entered. Golden v. Zwickler, 394 U.S. 103 (1969). Appellee was terminated in 1977; the statute applicable to his termination was section 110.061, Florida Statutes (1977), which was subsequently repealed. Thus, no live controversy as to the 1981 statute, which the district court declared unconstitutional, could possibly have existed as to Appellee since the 1981

statute had neither been promulgated nor applied at the time of Appellee's termination.

Further, Appellee lacked the requisite personal stake in the outcome of the litigation which was necessary to invoke the power of a federal court. North Carolina v. Rice, 404 U.S. 244 (1971). Because Appellee voluntarily resigned from state employment in 1979, he could not possibly have been subject to the termination provisons of Chapter 110, Florida Statutes (1981). Thus Appellee's rights could in no way have been affected by a declaration as to Chapter 110's constitutionality.

Additionally, there was no remedy available to redress Appellee's alleged injuries. He was not entitled to an injunction because he voluntarily left state employment or to damages because of

the good faith immunity of the state officials. Thus, any ruling on the statute was simply an advisory opinion which the federal courts have no power to grant. United Public Workers of America v. Mitchell, 330 U.S. 75 (1947).

I.B. Chapter 110, Florida Statutes (1981), is constitutional on its face. It is clear that any court interpreting a statute has a duty to interpret that statute constitutionally if at all possible. Buttfield v. Stranaham, 192 U.S. 470 (1904).

While the statute in question does not on its face state a precise time during which a post-termination hearing must be held, the district court could have, and should have, as other courts have done in interpreting other statutes, see infra pp. 34-38, interpreted the statute to provide a hearing within a period the court

considered constitutionally mandated. Instead, the district court struck a statute fully capable of constitutional interpretation.

I.C. The statute in effect at the time of Appellee's termination was constitutionally applied to him. The time which elapsed between Appellee's appeal and the time such appeal was set for hearing was not so long as to render the statute constitutionally infirm.

II. Appellants are entitled to good faith immunity under this Court's ruling in Harlow v. Fitzgerald, 457 U.S. 800 (1982). Harlow redefined the test for determining the applicability of the good faith immunity defense and held that such defense is based on a strictly objective test. The lower courts were instructed to determine whether the law in question was clearly established at the time the complained of action occurred.

Harlow, 457 U.S. at 818-819. If the law was not clearly established, officials may rely upon the good faith immunity defense.

In this case, the district court explicitly found no violation of clearly established constitutional law. (67a). Rather than ending the inquiry there, however, the court went on to find that a violation of an invalid agency general order somehow abrogated Appellants' objective good faith immunity.

Such a ruling is in direct contravention of this Court's instructions in Harlow. Harlow makes it clear that good faith immunity is abrogated only if a clearly established constitutional right is violated. No such constitutional right was violated in this case, and thus Appellants are entitled to immunity from damages.

ARGUMENT

I

THE PROVISIONS OF CHAPTER 110, FLORIDA STATUTES (1981), WHICH RELATE TO POST-TERMINATION HEARINGS, ARE CONSTITUTIONAL.

A. The Issue of Chapter 110's Constitutionality Was Not a Justiciable Issue and Was Moot.

The district court, as affirmed by the appellate court, declared Chapter 110, Florida Statutes (1981), and its implementing rules, unconstitutional due to their failure to require a "prompt" post-termination hearing. However, the district court should neither have considered the issue nor entered a declaratory judgment on such a question because the court had no justiciable issue before it.

For a declaratory judgment to be appropriate, a live dispute as to the statute's constitutionality must be presented at the time of the court's hearing. "For adjudication of

constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite." Golden v. Zwickler, 394 U.S. 103, 108 (1969), quoting, United Public Workers of America v. Mitchell, 330 U.S. 75 (1947). The question must demonstrate a controversy between the parties of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment." 394 U.S. at 108.

A live dispute, as defined in Golden v. Zwickler, is lacking here for several reasons. First, in any case involving the constitutionality of a statute, the statute under attack must have been in effect at the time of the action complained of and must have been applied to the complaining party.

In International Longshoremen's and Warehousemen's Union, Local 37 v. Boyd, 347

U.S. 222 (1954), plaintiffs sought a declaratory judgment as to the enforcement of a federal statute. This Court found it had been asked to rule on a statute that had not been applied to plaintiffs. This Court stated:

> Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.

347 U.S. at 224 (citations ommitted).

In this case, the district court found Chapter 110, Florida Statutes (1981), unconstitutional. (80a). However, the action Appellee complained of, his discharge, occurred in 1977. Thus, the statute the district court struck had not been enacted by the Florida Legislature nor, like the Boyd plaintiffs, applied to Appellee at the time of his discharge some four years earlier. Therefore, no live

dispute could possibly have existed as to the constitutionality of Chapter 110, Florida Statutes (1981).

Nor can a live dispute be said to exist at this point in time. An actual controversy must exist at all stages of appellate review in order to avoid mootness. DeFunis v. Odegaard, 416 U.S. 312 (1974).

Second, in order for a declaratory judgment to be appropriate, the moving party must have a personal stake in the resolution of the issue before the court.[2] O'Shea v. Littleton, 414 U.S. 488, 494 (1974). In O'Shea, plaintiffs challenged bond-setting, sentencing and jury fee practices. But none of the plaintiffs suffered any of the injuries

---

[2]This principle is equally applicable in cases where statutory questions are raised. 414 U.S. at 494.

specified in the complaint. Thus, this Court found that a personal stake was lacking, and no declaratory judgment could issue.

Further, if a party lacks "a legally cognizable interest in the outcome" of the litigation, the issue is moot and inappropriate for declaratory judgment. Murphy v. Hunt, 455 U.S. 478 (1982), quoting, United States Parole Commission v. Geraghty, 445 U.S. 388, 396 (1980). In Murphy v. Hunt, a statute prohibiting pre-trial bail for persons charged with sexual offenses was alleged to be unconstitutional. This Court deemed the claim for declaratory relief moot because the plaintiff had been convicted of the sexual offenses and was no longer subject to the provisions of the statute.

> If a dispute has . . . evanesced because of changed circumstances, including the passage of time, it is

> considered moot. With the designation of mootness comes the concomitant designation of nonjusticiability . . . 'Federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.'

In re S.L.E., Inc., 674 F.2d 359, 364 (5th Cir. 1982), quoting North Carolina v. Rice, 404 U.S. 244 (1971).

In the instant case, Appellee voluntarily left the state of Florida's employ in January, 1979. Since that time, he could not possibly have been exposed to the termination provisions of Chapter 110, Florida Statutes, which govern the termination of state employees. Appellee's status could not be affected in any way by a declaration as to the constitutionality of those laws. Therefore, because Appellee could in no way be affected by the Court's declaratory judgment, he did not possess the requisite "personal stake" in the

results of a declaratory ruling on the validity of Chapter 110 which would enable the district court to properly address that question.

Third, a claim for declaratory relief is moot if there is no possible remedy to redress the injuries claimed. Ashcroft v. Mattis, 431 U.S. 171, 172 (1977). When a litigant is entitled to neither injunctive relief nor damages, a declaratory judgment is an advisory opinion which the federal courts are without power to grant. 431 U.S. at 172.

In Ashcroft v. Mattis, the parents of a minor, who had been killed by police while attempting to flee to avoid arrest, challenged the constitutionality of the state statute which authorized the use of deadly force under such circumstances. The damage claims were unsuccessful due to the defendant officers' good faith immunity.

Because there was no basis for damages or an injunction, this Court held that there was no possible basis for a declaratory judgment. To hold otherwise, the Court stated, would be asking the trial court to answer "a hypothetical question whether the defendants would have been liable apart from their defense of good faith." 431 U.S. at 172.

In the instant case, Appellee voluntarily resigned from the Highway Patrol and did not seek reinstatement; therefore an injunction was not a possible remedy. Clearly damages were also not available in regard to the issue of the insufficiency of Chapter 110 simply because of its failure to require that a hearing be provided within a set period after dismissal from state employment. Also, the district court's award of damages was not based in any way upon the delay of the

Career Service Commission post-termination hearing.[3] Rather, the district court's order makes clear that the damages flowed from the claimed pre-termination procedural violations. (69a-71a). In fact, the district court stated that but for the adoption of General Order 43, providing for certain pre-termination procedures, "no damages of any kind could be awarded". (70a).[4]

---

[3]The damages awarded were based on the finding that "Beach and Davis followed procedures contrary to the department's rules and regulations." (70a). They could not possibly be based on the timeliness of the Career Service Commission hearing over which Beach and Davis, as DHSMV employees, had no control.

[4]The district court stated: "If this departmental order [General Order 43] had not been adopted just prior to Scherer's dismissal, no damages of any kind could be awarded. . . . Beach and Davis . . . should be bound by their department's own orders. . . ." (70a-71a).

The court certainly could not have held otherwise, since the law relating to the timing of post-termination hearings was far from "clearly established" in the Northern District of Florida in 1977 and 1978. Weisbrod v. Donigan, 651 F.2d 334 (5th Cir. 1981).[5] Therefore, Appellants' good faith immunity[6] would bar any damages arising out of the delay in providing Appellee a post-termination hearing and no remedy was available for Appellee's alleged injuries.

Additionally, principles of equity forbid damages under the instant circumstances. Under Florida law, the Career Service Commission, a quasi-judicial

---

[5]Fifth Circuit law governed the Northern District of Florida prior to the split of the Fifth Circuit into the Fifth and Eleventh Circuits. Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981).

[6]See the discussion of good faith immunity under II, infra.

executive agency,[7] has the responsibility to hear appeals of suspended or discharged state employees. Appellants, all employees of the DHSMV, an agency wholly separate and distinct from the Career Service Commission, certainly could not, in fairness, be held personally liable in damages for any delay of the Career Service Commission. Appellants had absolutely no authority or control in setting Appellee's appeal for hearing before the Commission.

Since neither injunctive nor monetary relief was available to Appellee as a result of the delay in the scheduling of his Career Service Commission hearing, under the rational of Ashcroft v. Mattis, 431 U.S. 171, Appellee's claim for declaratory relief was moot.

---

[7]The Career Service Commission is a part of the Florida Department of Administration. §110.301, F.S. (1981). As such, its powers and duties are specifically delineated by the Legislature. §110.305, F.S. (1981).

B. Chapter 110, Florida Statutes (1981), Is Constitutional On Its Face.

Subsection 110.309(1), Florida Statutes (1981), states:

> A permanent employee in the State Career Service System who is suspended or dismissed by an agency or officer shall be entitled to a de novo fact-finding hearing.

The district court, as affirmed by the appellate court, apparently[8] found this section unconstitutional because it does not specify on its face a time certain by which the post-termination hearing must be held.

---

[8]The district court's opinion does not point specifically to any section or subsection of the statute which is unconstitutional but simply says: "Chapter 110, Florida Statutes (1981) and its implementing rules are unconstitutional insofar as they fail to provide a prompt post-termination hearing." (75a). The above-quoted subsection is the one pertinent to post-termination hearings. The entire section is shown infra, p.3.

The lower court's order holding Chapter 110 unconstitutional violates the well-settled law of statutory interpretation. It is beyond doubt that every statute comes to the court with a presumption of constitutionality. As this Court has stated:

> In examining the statute in order to determine its constitutionality we must be guided by the well-settled rule that every intendment is in favor of its validity. It must be presumed to be constitutional, unless its repugnacy to the Constitution clearly appears.

Buttfield v. Stranaham, 192 U.S. 470, 492 (1904) (citations omitted).

Thus, if there was any way in which the district court could have interpreted Chapter 110, Florida Statutes, so as to render it constitutional, it should have done so.[9] Regional Rail Reorganization Act

---

[9]While Appellants do not contend that their interpretation of the statute in question

(cont'd on next page)

Cases, 419 U.S. 102 (1974); Graham v. Richardson, 403 U.S. 365 (1971); United States v. Vuitch, 402 U.S. 62 (1971); Alabama State Federation of Labor v. McAdory, 325 U.S. 450 (1945).

Where a certain interpretation of a statute will cast doubt on the statute's constitutional validity, the court must avoid that interpretation unless there is a clear statement of legislative intent to the contrary. United States v. Thompson, 452 F.2d 1333, 1337 (D.C. Cir. 1971), cert. den., 405 U.S. 998 (1972). Accord, Port Construction Co. v. Government of Virgin Islands, 359 F.2d 663, 665 (3d Cir. 1966).

---

is strained, it should be noted that even a strained interpretation is not only permissible but desirable if it will save the constitutionality of a statute. Ullmann v. United States, 350 U.S. 422 (1956); 2A Sutherland Statutory Constitution §45.11 (1973).

The fact that one of several alternative statutory interpretations will cause constitutional difficulties is a valid reason to reject that interpretation. As this Court has said:

> We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act.

National Labor Relations Board v. Laughlin Steel Corp., 301 U.S. 1, 30 (1936). See also, Missouri Pacific Railroad Co. v. Boone, 270 U.S. 466 (1926); 2A Sutherland Statutory Construction §45.11 (1973).

In the instant case, as with most cases of statutory construction, any analysis of the statute must begin by looking at the plain meaning of the statute itself. Lewis v. United States, 445 U.S. 55 (1980). "Interpretation of a statute begins with its plain words." Charter Air Center v.

Florida Public Service Commission, 503 F.Supp. 243, 244 (N.D. Fla. 1980), citing Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), cert. den., 449 U.S. 1113 (1981).

The statute in question here clearly and unequivocally provides for a post-termination hearing in the case of a discharged state employee. It must be presumed that the Florida Legislature, in enacting such a requirement, intended the hearing requirement to occur within constitutional time limits. Houston and Texas Central Railroad Co. v. Texas, 177 U.S. 66 (1900); Southwestern Railway Co. v. Arkansas, 235 U.S. 350 (1914); United States v. Thompson 452 F.2d 1333 (D.C. Cir. 1971), cert. den., 405 U.S. 998 (1972); 2A Sutherland Statutory Construction §45.11 (1973).

The lower court should have upheld the cosntitutionality of Chapter 110 by

interpreting it to provide a hearing within whatever time the lower court considered necessary in order to meet the requirements of promptness.[10] Such interpretations have been made in many instances in order to save a statute from unconstitutionality. 2A Sutherland Statutory Construction §45.11 (1973).

In United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971), this Court considered the constitutionality of 19 U.S.C. §1305(a) which authorized the seizure of obscene materials by customs collectors and provided for forfeiture proceedings, but failed to prescribe time limits for the institution and completion

---

[10]It should be noted that this is not a case where the statute affirmatively contains an unconstitutional provision, such as totally prohibiting a post-termination hearing. In this case, the statute apparently offended the lower court by omitting some court-preferred language.

of forfeiture proceedings. This Court noted that while the statute did not contain explicit time limits, "it is possible to construe the section to bring it in harmony with constitutional requirements." 402 U.S. at 368. In saving the statute's constitutionality, this Court simply read in time limits consistent with appropriate case law.

In Jordan v. United Insurance Co. of America, 289 F.2d 778 (D.C. Cir. 1961), the issue was whether the Superintendent of Insurance had the statutory authority to conduct a hearing mandated by due process. The court found that the duty to conduct the hearing, together with any necessary powers to conduct such hearing, was to be implied from the statute. The court stated that:

> If such a hearing is the only way in which plaintiff can receive due process, then we will draw

> the implications necessary to save the constitutionality of the statute.

289 F.2d at 782.

Similarly, in Caswell v. Califano, 583 F.2d 9 (1st Cir. 1978), there was a question about delays prior to hearings on social security benefits. In that case, where the court did find the delays to be unreasonable, it nevertheless devised a remedy. The court stated that it would "set time limts for agency action to insure that statutory rights are vindicated." 583 F.2d at 16.

In Cornelius v. Minter, 395 F.Supp. 616 (D.C. Mass. 1974), the court found that the waiting period for welfare services was not reasonably prompt as required by statute. In that case, the court stated that: "Courts are uniquely suited to determining what is reasonable in such a situation." 395 F.Supp. at 621 (citations omitted).

Finally, in People v. Armor, 523 P.2d 1173 (Cal. 1974), the issue was whether a California statute requiring the defendant to pay for appointed counsel deprived her of property without due process. In that case, the statute in question did not expressly provide for notice and a hearing. However, the court found that the absence of express provisions did not make the statute unconstitutional. The court said:

> Not only may the requirements of notice and a hearing be implied from the due process clause, but, in addition, the rights to discovery, confrontation, cross-examination, and other procedural devices may likewise be implied.

523 P.2d at 1179.

Thus, as the above cases illustrate, the lower court in this case should have construed Chapter 110, Florida Statutes, to include what it considered to be a reasonable time limit for the holding of a

post-termination hearing, in order to save the constitutionality of the statute.

Additionally, a distinction is often made between a statute which is void on its face and incapable of any valid application and a statute which is unconstitutionally applied. See, Thornhill v. State of Alabama, 310 U.S. 88 (1939); 1 Sutherland Statutory Construction §2.06 (1973). And, even if the lower court was correct in finding the statute unconstitutionally applied in Appellee's case,[11] the statute should not have been declared unconstitutional.

A statute is defined as facially invalid when it is "always and however applied" invalid. Davis v. Williams, 617 F.2d 1100, 1105 (5th Cir. 1980), cert.

---

[11]Appellants contend that the statute was constitutionally applied to the Appellee. See, I.C., infra.

den., 449 U.S. 937 (1981). In Davis, the Court of Appeals for the Fifth Circuit reversed the lower court's finding that a regulation limiting the speech of firemen was facially invalid. The court found that the regulation could be constitutionally applied and that "to strike it down, therefore, would require a departure that is beyond our powers." 617 F.2d at 1105.

Similarly, in Bickel v. Burkhart, 632 F.2d 1251 (5th Cir. 1980), the court defined "malicious" in such manner as to uphold the constitutionality of a regulation limiting speech. The court found the regulation in question facially valid, but unconstitutionally applied. See also, Anderson v. Edwards, 505 F.Supp. 1043 (S.D. Ala. 1981).

Thus, in the instant case, even if the lower court was correct in finding the statute unconstitutionally applied to

Appellee, it is not facially unconstitutional because it is capable of constitutional interpretation as demonstrated above. The lower court clearly should have set an appropriate time limit and required compliance with that time limit in order to save the statute from facial unconstitutionality.

C. Chapter 110, Florida Statutes, Was Constitutionally Applied to Appellee.

There is no dispute among the parties that approximately nine months elapsed between the time Appellee filed his Career Service Commission appeal and the time such appeal was set for hearing. Relying on the case of Barry v. Barchi, 443 U.S. 55 (1979), the lower court concluded that this length of time was so long as to deny Appellee a constitutionally satisfactory post-termination hearing.

However, the rationale behind the decision in Barry is totally inapposite to Appellee's situation. In Barry, a horse trainer's license was suspended for fifteen days upon suspicion that one of his horses had been drugged. The statute in question provided for a suspension that would remain in effect pending a post-suspension hearing. The statute did not specify a time for the hearing.

This Court found the statute in Barry to be unconstitutionally applied because it did not assure a timely hearing. This Court noted that because of the brief suspension, no hearing would be held until the full penalty had already run. This Court further emphasized the fact that the "consequences to a trainer of even a temporary suspension can be severe. . . ." 443 U.S. at 66. The trainer would be very likely to lose the clients he had

cultivated over his career and such a loss could not be remedied by any post-suspension hearing. Therefore, this Court found it necessary to hold that the trainer receive his suspension hearing either before or immediately after the suspension.

Appellee's situation is to be contrasted with the facts of Barry. The Florida Career Service Commission is, and was, authorized to award back pay as well as order the reinstatement of a prevailing employee. See, §110.061(3), Florida Statutes (1977); §110.309(3), Florida Statutes (1981). Upon prevailing at the Career Service Commission, Appellee in this case could be, and was, made whole, unlike the plaintiff in Barry who might never hope to recover the loss of his past or future clients. Therefore, Barry does not support the lower court's ruling.

More to the point are the cases dealing with situations in which the government affords a hearing after governmental action has occurred. These cases reveal several principles instructive in the instant case. First, government agencies are generally afforded substantial discretion in the scheduling of hearings. "Courts must normally defer to agency judgment to allow the evolution of procedures as needs arise." Caswell v. Califano, 583 F.2d 9, 15 (1st Cir. 1978) (citation omitted).

In Wilkinson v. Abrams, 627 F.2d 650 (3d Cir. 1980), the issue was the validity of a regulation concerning the administrative appeal process used by states in the state unemployment compensation program. The regulation in question stated that the appeals would be decided with the greatest promptness administratively feasible. The plaintiffs argued that such a regulation

fostered undue delays and deprived them of due process.

In upholding the regulation, the court noted that the goal of promptness was met. It stated that it could not impose standards for administrative performance that were not feasible and that to do so would jeopardize promptness and accuracy. The court further noted that trying to force an agency to act within an administratively unfeasible timetable would increase the likehood of erroneous decisions.

Thus the Wilkinson court recognized the neccessity of deferring to the agency's judgment. In this case, deference must be given to the Florida Career Service Commission which scheduled hearings as quickly as was feasible at the time, given the resources then available.

A second principle which emerges from cases discussing post-governmental action hearings is that the party complaining of a denial of due process because of delay must show that he was prejudiced by such delay. In Blackford v. Maryland Automobile Insurance Fund, 532 F.Supp. 24 (D. Md. 1981), laid off employees challenged their dismissal under §1983 on due process grounds, due to the fact that approximately three and one half years had elapsed between the time administratiave proceedings started and a final opinion was entered. The court found that the plaintiffs did not state a due process claim because they had not shown prejudice. The court stated that the plaintiffs could still come to federal court with their claims and that they were in no better or worse position in regard to these claims.

Similarly, in Ross v. United States Post Office, 664 F.2d 191 (8th Cir. 1981), a delay by the federal Merit System Protection Board of almost one year in declining to review plaintiff's appeal was not shown to be prejudicial, and thus the court found no denial of due process. In the instant case, because Appellee could be made whole under the statutory scheme of the Florida Career Service Commission and because he could still bring his claims to federal court, he can demonstrate no prejudice.

Third, a review of court decisions to determine what is an acceptable length of time between governmental action and a hearing reveals that there is no absolute constitutionally mandated time by which a hearing must be held. Delays longer than or approaching that experienced by Appellee have been found to be constitutional.

For example, in Blackford v. Maryland Automobile Insurance Fund, supra, a three and one half year delay was held not to deny due process. In Alsbury v. United States Post Office, 530 F.2d 852 (9th Cir. 1976), cert. den., 429 U.S. 828 (1977), a delay of approximately six months was found to fall considerably short of what would be necessary to demonstrate a deprivation of constitutional due process.

In Thompson v. Bass, 616 F.2d 1259 (5th Cir. 1980), cert. den., 449 U.S. 983 (1980), a delay of approximately six months between a permanent employee's discharge and reinstatement apparently did not offend due process. In Ciechon v. City of Chicago, 634 F.2d 1055 (7th Cir. 1980), due process was not denied where it took more than six months from the filing of charges to get a decision on a suspension.

The above survey makes it clear that there is a wide variation as to the definition of promptness required by due process. It cannot be said in Appellee's case that the delay in question was of such a magnitude as to deny him due process.

Finally, Appellee cannot complain of any time lag in his requested hearing where he failed to seek an expedited hearing. Dorothy Roberts, Career Service Coordinator for the State of Florida, testified at trial that if Appellee had requested an expedited hearing, one would have been held. (T, vol. I, p. 19). In Stolberg v. Caldwell, 423 F.Supp. 1295 (D. Conn. 1976), the court held that the plaintiff could not complain of the slowness of his remedy (in that case a state court remedy) where he had not sought an expedited hearing. Clearly, the statute was constitutionally applied to Appellee and his complaint that

he was not afforded due process must be denied.

II.

APPELLANTS ARE ENTITLED TO GOOD FAITH IMMUNITY BECAUSE THEIR CONDUCT DID NOT VIOLATE CLEARLY ESTABLISHED FEDERAL CONSTITUTIONAL LAW.

Beginning with Scheurer v. Rhodes, 416 U.S. 232 (1974), this Court has consistently held that government officials are shielded from an award of damages for a violation of 42 U.S.C. §1983 by a qualified immunity defense based on the good faith performance of their duties. Scheurer announced the qualified immunity defense in very general terms. Scheuer instructed the courts to look to the scope of discretion and responsibilities of the office and all circumstances as they reasonably appeared at the time of the action in question. However, this Court recognized that the doctrine of good faith immunity was not static and would be developed in more detail in subsequent cases. 416 U.S. at 249.

This Court's next pronouncement on good faith immunity came in Wood v. Strickland, 420 U.S. 308 (1975), which dealt with the immunity of public school officials. A definite two-prong test for determining whether an official acted in good faith and would therefore be shielded from an award of damages in a suit brought under §1983 was established. This two-prong test consisted of an objective and subjective portion relating to the official's objective knowledge of the law as well as his subjective intent.

In Wood v. Strickland, the Court emphasized important policy reasons for fashioning a qualified immunity defense for public officials.

> "Public officials, whether Governors, Mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices.

> Implicit in the idea that officials have some immunity -- absolute or qualified -- for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all." Scheuer v. Rhodes, 416 U.S., at 241-242, 94 S.Ct., at 1689 (footnote omitted).

420 U.S. at 321.

Those policy reasons are of equal importance today. Decision makers must be allowed to act in accordance with the law and, on occasion, to err without being liable for these decisions. To require otherwise is to chill the action of making decisions.

In Procunier v. Navarette, 434 U.S. 555, 562 (1977), this Court further explained that under the "objective" prong of the good faith immunity test, the immunity defense is unavailable to officials sued for damages under §1983 when three elements are present: (1) "the

constitutional right allegedly infringed by them was clearly established at the time of their challenged conduct", (2) "they knew or should have known of that right", and (3) "they knew or should have known that their conduct violated the constitutional norm" (emphasis added).

The second prong of the good faith immunity test is a "subjective" one, and asks whether the official acted with "actual malice". Wood v. Strickland, 420 U.S. 308, 321. If so, the good faith defense is unavailable. Id., see also, Butz v. Economou, 438 U.S. 478 (1978).

Subsequent experience with the good faith immunity defense in the federal courts proved that the subjective element of the defense was unworkable. Thus, when recently presented with the good faith immunity issue, this Court found that:

> It now is clear that substantial costs attend the litigation of the subjective good faith of government officials. . . . -- distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. . . . Judicial inquiry into subjective motivation. . . can be peculiarly disruptive of effective government.

Harlow v. Fitzgerald, 457 U.S. 800, 816-817 (1982) (footnotes omitted).

To remedy this, in Harlow, this Court totally eliminated the subjective prong of the immunity defense[12] and held that the

---

[12]As Justice White recently stated: "Just last Term, we modified the qualified immunity public officials enjoy in suits seeking damages against federal officials for alleged deprivations of constitutional rights, eliminating the subjective component of the standard. See, Harlow v. Fitzgerald, ___ U.S. ___, 102 S.Ct, 2727, 73 L.Ed.2d 396 (1982)." Illinois v. Gates, ___ U.S. ___, 103 S.Ct. 2317, 2347 (1983), Justice White concurring.

The Court of Appeals for the Eleventh Circuit put it this way:

> Since the Supreme Court decision in Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the standard for gauging the good faith of government officials . . . has been an objective one. Scott

(cont'd on next page)

proper scope of judicial inquiry into the official's conduct in determining whether the immunity defense would be available was solely limited to the objective test.

> [T]he judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly to be said to "know" that the law forbade conduct not previously identified as unlawful.

457 U.S. at 818 (emphasis added). Thus, the above review of the history of the good faith immunity doctrine demonstrates that the objective prong of the immunity

---

v. Dixon, (11th Cir., No. 82-8376, Dec. 15, 1983.)

Another court has noted that:

> Harlow . . . jettisoned the subjective, fact-oriented element of qualified immunity and recast the doctrine in terms of objective good faith. McSurely v. McClellan, 697 F.2d 309, 316 (D.C. Cir 1982).

defense, as set out in Wood and Procunier, is the present standard for determining good faith immunity.

Analyzed in light of the evolving doctrine of good faith immunity and this Court's definitive pronouncement on the subject in Harlow v. Fitzgerald,[13] the lower court's denial of good faith immunity to Appellants was clearly wrong. In its Order Amending Judgment (64a), the lower court specifically found that at the time of the official conduct which gave rise to Appellee's claim that his pre-termination due process rights were violated, there was

---

[13]Though Harlow involved federal, not state officials, Harlow's immunity principles are applicable here. In Butz v. Economou, 438 U.S. 478, 504 (1978), this court found that "it would be untenable to draw a distinction for purposes of immunity law between suits brought against state officials under §1983 and suits brought directly under the Constitution against federal officials."

no clearly established constitutional law that such conduct violated Appellee's rights.[14] (66a-67a). Under Wood, and Procunier as limited by Harlow, this should have ended the inquiry into the good faith immunity defense, and judgment for the Appellants should have been entered.[15]

The lower court found, however, that because Appellants had not followed the FHP General Order 43 in dismissing Appellee,

---

[14]In making this decision, the district court relied on a Fifth Circuit case which held that the law as to pre-termination due process was not clearly established until late 1978. Weisbrod v. Donigan, 651 F.2d 334 (5th Cir. 1981). Appellee was discharged in 1977.

[15]The lower court's decision was entered shortly before Harlow was announced. However, because the lower court found that Appellants acted without malice, only the objective prong of the good faith immunity test was at issue. The lower court explicitly stated: "These damages should not be considered PUNITIVE damages, which would have been awarded if the defendants' actions demonstrated malicious intention." (54a).

they violated clearly established state law. [16] Therefore, the lower court erroneously concluded that Appellants did not meet the objective test for good faith immunity.

In making this determination, the lower court relied on Williams v. Treen, 671 F.2d

---

[16]This conclusion is erroneous in several respects. First, General Order 43 required a complete investigation into the facts of the offense and a written statement by the employee. As the Statement of Facts indicates, General Order 43 was followed in Appellee's case. Statement of Facts, supra. pp. 7-8. Second, the lower court found that General Order 43 was promulgated pursuant to Chapter 120, Florida Statutes. (69a). However, General Order 43 was not promulgated pursuant to Florida's Administrative Procedures Act until March 19, 1981. Ch. 15B-11.14, Fla. Admin. Code. Therefore it did not have the effect of law until some four years after Appellee's discharge. Prior to that time, General Order 43 was not state law, nor was it even a valid rule or regulation under Florida law. General Development Corp v. Divison of State Planning, Department of Administration, 353 So.2d 1199 (Fla. 1st DCA 1977); Florida Department of Offender Rehabilitation v. Walsh, 352 So.2d 575 (Fla. 1st DCA 1977).

892 (5th Cir. 1982), cert. den., ___ U.S. ___, 103 S.Ct. 762 (1983) and the superceded "reasonableness" language of Scheuer. In both Williams and the lower court's order sub judice, the respective courts looked back to this Court's initial and general announcement of the good faith immunity test in Scheuer v. Rhodes. Reasoning that Scheuer had announced a general test of "reasonableness" of the official's conduct, the court in Williams and the lower court here held that, because official conduct which violates state law is not "reasonable", the good faith immunity defense does not shield the official from an award of damages.

Such strained reasoning is clearly contrary to this Court's elucidation of the good faith immunity test in Harlow. To rely on the early general discussion of reasonableness in Scheuer is to ignore the substantial development of the good faith

immunity defense in subsequent cases. This Court's explicit instructions as to the content of the immunity defense in Wood, Procunier, Butz and Harlow were meant to clarify the requirements for good faith immunity.

This Court has been most specific in detailing the exact nature of the proper scope of judicial inquiry into the official's conduct in determining whether good faith immunity is available. This Court in Scheuer recognized that further development of the very general test for good faith immunity set out in that case was necessary. "These cases, in their present posture, present no occasion for a definitive exploration of the scope of immunity available to state executive officials. . . ." Scheuer v. Rhodes, 416 U.S. at 249.

An opportunity to be "definitive" concerning the good faith immunity test arose in Procunier v. Navarette, supra, where this Court said that, objective good faith immunity is unavailable to state officials only if "the constitutional right allegedly infringed . . . was clearly established at the time of their challenged conduct" and "they knew or should have known of that right" and "they knew or should have known that their conduct violated the constitutional norm." Procunier v. Navarette, 434 U.S. at 562 (emphasis added).

In Procunier, the plaintiffs had alleged that prison officials, in violating their constitutional rights, had also violated certain prison mail regulations. Yet this Court held that "[a]s a matter of law . . . there was no basis for rejecting the immunity defense on the ground that

petitioners [prison officials] knew or should have known that their alleged conduct violated a constitutional right." 434 U.S. at 565.

There was no suggestion in Procunier that violation of the prison mail regulations, akin to the FHP's General Order 43, was a proper consideration in determining whether the objective good faith immunity test had been met. Instead, this Court, in determining whether the constitutional right in question was clearly established at the time the official conduct took place, did so "by reference to the opinions of this Court, of the Court of Appeals, or of the local District Court." 434 U.S. at 565.

Procunier, Wood, Butz, Harlow, and other federal cases following these decisions, have consistently stated the objective good faith immunity test

exclusively in terms of whether the constitutional law allegedly violated was clearly established at the time of the conduct in question. Numerous cases, both before and after Harlow, illustrate this concept.

Good faith immunity has been granted where the constitutional law was not clearly established. Johnson by Johnson v. Brelje, 701 F.2d 1201 (7th Cir. 1983), was a §1983 action in regard to the commitment of defendants found unfit to stand trial. All males found unfit to stand trial in Illinois were automatically committed to a maximum security mental health facility. The court found this violative of a state statute (Ill. Rev. Stat. Ch. 91 1/2, §2-102 (1981)) which required that an inmate be placed in the least restrictive environment.

However, even though defendants had violated a state statute, the court still found them entitled to immunity.

> We believe that the defendants did not violate the plaintiffs' clearly established constitutional rights and thus cannot be held liable for damages. When state officials act, they cannot be expected to anticipate subsequent legal developments nor can they be said to "know" that the law forbids conduct not previously identified as unlawful. [Harlow v. Fitzgerald], 102 S.Ct. 2739. We are aware of no prior case that has interpreted or determined the significance of Ill. Rev. Stat. Ch. 91 1/2, §2-102 -- the source of the state-created liberty interest in this case. The defendants' practice of making general regulations . . . is not, in itself, an unconstitutional practice. The defendants should not be held liable for failing to identify §2-102, to relate this provision to the Fourteenth Amendment, and to institute procedures that satisfy the minimum requirements of due process (emphasis in original).

701 F.2d at 1210.

Similarly, in Silverman v. Ballantine, 694 F.2d 1091 (7th Cir. 1982), immunity was granted to state officers. In Silverman,

representatives of the decedent's estate sued various officials due to decedent's death of a heart attack after his arrest. The court held that defendants were entitled to immunity unless they should have known that their actions violated the decedent's constitutional rights. The court found that defendants could not have known that the decedent had a Sixth Amendment right to counsel at the time of his arrest; thus they were entitled to immunity.

Conversely, good faith immunity has been denied where the constitutional law in question was clearly established. In Rhode Island Affiliate, American Civil Liberties Union, Inc. v. Rhode Island Lottery Commission, 553 F.Supp. 752 (D.R.I. 1982), immunity was denied to officials under Harlow, where it was clear that the treatment of the ACLU's application to hold

a raffle violated its First Amendment rights.

In Fujiwara v. Clark, 703 F.2d 357 (9th Cir. 1983), officials were denied immunity in connection with an employee's discharge where they should have known that their conduct violated plaintiff's constitutional rights. The court found that defendants should have known that plaintiff's discharge for the exercise of First Amendment rights violated the standard of Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). See also, Williams v. Bennett, 689 F.2d 1370, 1385 (11th Cir. 1982), U.S. app. pndg. (unconstitutional prison conditions); Crowder v. Lash, 687 F.2d 996, 1007 (7th Cir. 1982) (prisoners' rights to due

process, access to courts, freedom of religion).[17]

Interjecting state regulations into the analysis of good faith immunity does nothing but confuse two unrelated issues.

---

[17]Numerous other cases have framed the objective good faith immunity test in terms of a constitutional violation. See, e.g., Coleman v. Turpen, 697 F.2d 1341, 1344 (10th Cir. 1983); Barnett v. Housing Authority of Atlanta, 707 F.2d 1571, 1582 (11th Cir. 1983); Ward v. Johnson, 690 F.2d 1098, 1111-1112 (4th Cir. 1982); Brewer v. Blackwell, 692 F.2d 397, 399 (5th Cir. 1982); Smith v. Heath, 691 F.2d 220, 226 (6th Cir. 1982); Clanton v. Orleans Parish School Board, 694 F.2d 1084, 1100 (5th Cir. 1981); Jihaad v. O'Brien, 645 F.2d 562 (6th Cir. 1981); Jackson v. State of Mississippi, 644 F.2d 1142, 1145 (5th Cir. 1981); Douthit v. Jones, 619 F.2d 527, 532-33 (5th Cir. 1980); Cruz v. Beto, 603 F.2d 1178, 1185 (5th Cir. 1979); Bogard v. Cook, 586 F.2d 399, 411 (5th Cir. 1978), cert. den., 444 U.S. 883 (1979); Schiff v. Williams, 519 F.2d 257, 261 (5th Cir. 1975); Lowe v. Carter, 554 F.Supp. 831, 836 (E.D. Mich. 1982); Peterson v. Davis, 551 F.Supp. 137, 146 (D. Md. 1982); Strathie v. Department of Transportation Commonwealth of Pa., 547 F.Supp. 1367, 1378 (E.D. Pa. 1982); Nakao v. Rushen, 545 F.Supp. 1091, 1092 (N.D. Cal. 1982).

It forces the federal courts to decide on a case-by-case basis when there is a sufficient relationship between a constitutional right and a state regulation or state law so that violation of that state regulation or law negates objective good faith immunity. Such a quagmire would be intolerable.

At most, then, the Williams v. Treen formula for good faith immunity encourages adherence to state statutes, rules and regulations, a subject of doubtful concern to the federal courts[18] and one which is adequately addressed, at least in the state of Florida, by state law. See, §110.309 (de novo review of employee suspensions and dismissals by State Career Service Commission); §120.68 (right of any person

---

[18]A violation of state law alone certainly does not vest a federal court with federal jurisdiction.

adversely affected by agency action to judicial review thereof), Florida Statutes (1981). Conversely, the Williams v. Treen test does much to restore the fear of damage suits which cripples state governmental operations, a fear this Court sought to alleviate in Harlow.

If the decisions of the lower court and Williams v. Treen are followed, state officials must operate with the fear that, even though a citizen has no clearly established constitutional right, if state statutes or regulations are not followed, and those statutes or regulations are later[19] determined by federal court to have

---

[19]The court recognized the unfairness of this situation in Wood v. Strickland, 420 U.S. at 319:

> Liability for damages for every action which is found subsequently to have been violative of a student's constitutional rights and to have caused compensable injury would

(cont'd on next page)

foreshadowed, perhaps several years hence, subsequently developed constitutional law, the officials will be liable for damages.[20] This flies directly in the face of this Court's statement in Procunier that officials "cannot be expected to predict the future course of constitutional law." 434 U.S. at 562. See also, O'Conner v. Donaldson, 422 U.S. 563, 577 (1975), where this Court said "an official has, of

---

unfairly impose upon the school decisionmaker the burden of mistakes made in good faith. . . .

[20]In light of the Supreme Court's decision in Butz v. Economou, 438 U.S. 478 (1978), that there is no reason to distinguish between state and federal officials' immunity defenses, a narrowing of the objective good faith immunity test would apply to federal officials also. See footnote 13. Thus, the good faith immunity defense would be unavailable to any federal official who violated a federal statute, rule or regulation, even though the constitutional right in question was not clearly established at the time of the official conduct which gave rise to the plaintiff's suit.

course, no duty to anticipate unforseeable constitutional developments."

Additionally, to decide the good faith immunity defense by reference to state law punishes those state agencies which have adopted procedures going beyond the requirements of federal constitutional law. Thus, a state agency would best be served by not providing any procedures for the protection of employees, prisoners, students or the general public unless required to do so by clearly established federal constitutional law. If no procedures are adopted, state officials cannot be held liable for damages even if, in the future, a federal court decides those procedures are constitutionally mandated. If prophylactic procedures are adopted and later found to be constitutionally required, agency officials will be liable in damages for failure to follow

their own procedures, if the reasoning of Williams v. Treen and the lower court is sanctioned by this Court. The end result is that the agency which is trying harder to provide protective procedures is punished.

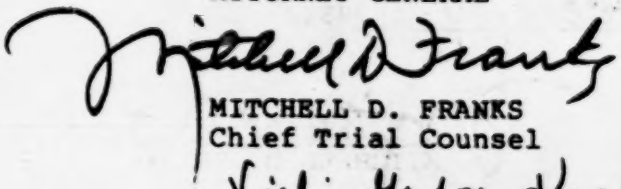
The lower court's decision that qualified good faith immunity was not available to Appellants because they did not follow an invalid agency general order contravenes this Court's cases establishing that "an official [will] not be held liable in damages under §1983 unless the constitutional right he has alleged to have violated was 'clearly established' at the time of the violation." Butz v. Economou, 438 U.S. at 498.

CONCLUSION

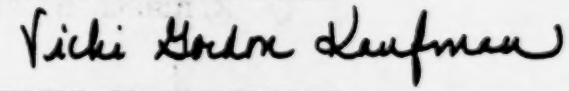
For the foregoing reasons, Appellants respectfully request that the judgment below be reversed and that judgment be enterd in favor of Appellants.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



MITCHELL D. FRANKS
Chief Trial Counsel



VICKI GORDON KAUFMAN
BRUCE A. MINNICK
Assistant Attorneys General

Department of Legal Affairs
The Capitol, Suite 1501
Tallahassee, Florida 32301
(904) 488-9935

Counsel for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ben R. Patterson, Patterson & Traynham, 1215 Thomasville Road, Post Office Box 4289, Tallahassee, Florida 32303, this 9th day of FEBRUARY, 1984.

MITCHELL D. FRANKS